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7 CAROLINE BARKER,
8 Plaintiff,
9 v.
10 LAUREN MCFERRAN,
11 Defendant.

Case No. [23-cv-00308-DMR](#)

**ORDER ON MOTION TO DISMISS
SECOND AMENDED COMPLAINT**

Re: Dkt. No. 77

12 Self-represented Plaintiff Caroline Barker filed a second amended complaint (“SAC”)
13 against Lauren McFerran, Chairperson of the National Labor Relations Board (“NLRB”), alleging
14 claims related to her employment with the NLRB. [Docket No. 68 (SAC).] Defendant now
15 moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to the SAC. [Docket No. 77.] This
16 matter is suitable for resolution without a hearing. Civ. L.R. 7-1(b). For the following reasons,
17 the motion is granted.

18 **I. BACKGROUND AND PROCEDURAL HISTORY**

19 Plaintiff makes the following allegations in the complaint, which the court takes as true for
20 purposes of this motion. Plaintiff is African-American and over the age of 40. SAC Ex. 2 at 1.
21 She has worked at the NLRB for 24 years and currently is a Program Support Assistant with GS-5
22 Step 10 compensation level. SAC ¶ 3. Plaintiff has never received a promotion, step increase, or
23 within grade increase. *Id.*

24 Plaintiff submitted a request for an ergonomic assessment on an unspecified date. *Id.* at ¶
25 24. An NLRB Human Resources Specialist confirmed receipt of a request of the same in January
26 2009. SAC ¶ 20, Ex. 23 at 1. In June 2009, the NLRB’s Human Resources division approved a
27 request for an ergonomic chair and one was purchased for Plaintiff. SAC ¶ 20, Ex. 23 at 2.
28 Plaintiff alleges that other employees received ergonomic chairs from 2009-2015, SAC ¶ 28, but

1 that she did not receive an ergonomic chair until 2015. SAC ¶¶ 21, 30, Ex. 23 at 3.

2 Plaintiff further alleges that she was denied a promotion in 2023. She applied for the
3 position of GS-0303-06 Program Support Assistant position, which she alleges was “a
4 promotional opportunity,” in May 2023. SAC ¶ 2, Ex. 3. In November 2023, Plaintiff inquired
5 about the status of her application and was told she “was rated ineligible and did not meet the
6 minimum education and/or experience requirements.” SAC ¶ 5, Ex. 5. Additionally, Plaintiff
7 alleges that she is the only Program Support Assistant who is assigned “to operate on a full-time
8 basis, as full-time Docket Clerk/Receptionist.” SAC ¶ 7. She alleges that in 2018, she was not
9 included on a rotation “for a Promotional Assignment to work on a Key Desk.” *Id.* at ¶¶ 10-13,
10 Ex. 8.

11 Plaintiff filed this lawsuit on January 20, 2023. The court granted in part and denied in
12 part Defendant’s motion to dismiss the complaint in October 2023. Specifically, the court denied
13 Defendant’s motion to dismiss Plaintiff’s Rehabilitation Act reasonable accommodation claim
14 based on the delay in providing Plaintiff with an ergonomic chair. *Barker v. McFerran*, No. 23-
15 CV-00308-DMR, 2024 WL 2031640, at *6 (N.D. Cal. May 6, 2024). The court granted the
16 motion to dismiss the other claims alleged in the complaint with leave to amend. *Id.* at *7.

17 Plaintiff timely filed the first amended complaint (“FAC”). Defendant moved to dismiss
18 all claims other than Plaintiff’s Rehabilitation Act reasonable accommodation claim based on the
19 ergonomic chair, and the court granted Defendant’s motion to dismiss in May 2024. *Barker v.*
20 *McFerran*, No. 23-CV-00308-DMR, 2024 WL 2031640, at *7-8 (N.D. Cal. May 6, 2024)
21 (“*Barker II*”). The court dismissed the following claims with prejudice: Title VII, Rehabilitation
22 Act, and Age Discrimination in Employment Act (“ADEA”) claims based on pre-November 24,
23 2014 events; Title VII claim based on failures to provide Plaintiff with an ergonomic chair and
24 keyboard; Rehabilitation Act claims for disability discrimination; Rehabilitation Act claim for
25 failure to accommodate by refusing to provide an ergonomic keyboard; hostile work environment;
26 and retaliation. The court granted Plaintiff leave to amend to allege Title VII and ADEA claims
27 based on Plaintiff’s November 2023 application for the position of Program Support Assistant. *Id.*

28 Plaintiff timely filed the SAC, which alleges the following claims for relief: “failure to

1 accommodate based on denial of an ergonomic chair and denial of promotion.” SAC ¶ 1. The
2 court liberally construes the claims as follows: 1) disability discrimination in violation of the
3 Rehabilitation Act, 29 U.S.C. § 791, based upon the denial of an ergonomic chair; 2) race, color,
4 and national origin discrimination in violation of Title VII, 42 U.S.C. § 2000e, based on the
5 November 2023 failure to promote; and 3) age discrimination in violation of the Age
6 Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 633a, based on the November 2023
7 failure to promote. *See* SAC 1 & ¶ 1.

8 Defendant now moves to dismiss the Title VII and ADEA claims. Plaintiff opposes the
9 motion. [Docket No. 78.]

10 **II. LEGAL STANDARDS**

11 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in
12 the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).
13 When reviewing a motion to dismiss for failure to state a claim, the court must “accept as true all
14 of the factual allegations contained in the complaint,” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)
15 (citation omitted), and may dismiss a claim “only where there is no cognizable legal theory” or
16 there is an absence of “sufficient factual matter to state a facially plausible claim to relief.”
17 *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing
18 *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
19 2001)) (quotation marks omitted). A claim has facial plausibility when a plaintiff “pleads factual
20 content that allows the court to draw the reasonable inference that the defendant is liable for the
21 misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged
22 must demonstrate “more than labels and conclusions, and a formulaic recitation of the elements of
23 a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (citing
24 *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *see Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir.
25 2001), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir.
26 2002).

27 Pro se pleadings must be liberally construed and “held to less stringent standards than
28 formal pleadings drafted by lawyers.” *Erickson*, 551 U.S. at 94. The Ninth Circuit has held that

1 “where the petitioner is pro se,” courts have an obligation, “particularly in civil rights cases, to
2 construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” *Bretz v.*
3 *Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc). “However, a liberal interpretation of
4 a civil rights complaint may not supply essential elements of the claim that were not initially
5 pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

6 **III. DISCUSSION**

7 Defendant moves to dismiss Plaintiff’s Title VII and ADEA claims based on failure to
8 exhaust administrative remedies. Defendant also argues that the claims should be dismissed as
9 insufficiently pleaded.

10 A federal employee must exhaust the administrative process required by statute before
11 filing an employment discrimination claim in federal court. *Brown v. Gen. Servs. Admin.*, 425
12 U.S. 820, 832 (1976); *Sommatino v. United States*, 255 F.3d 704, 707 (9th Cir. 2001) (citing 42
13 U.S.C. § 2000e-16(c)); *Leorna v. United States Dep’t of State*, 105 F.3d 548, 550 (9th Cir. 1997)
14 (individuals claiming disability discrimination under the Rehabilitation Act must exhaust
15 administrative remedies). “Under the Title VII statutory and regulatory scheme, a federal
16 employee must notify an EEO counselor of discriminatory conduct within 45 days of the alleged
17 conduct, and then, if the matter is not resolved, the employee may submit a formal administrative
18 complaint.” *Sommatino*, 255 F.3d at 708. Failure to initiate administrative action within the 45-
19 day deadline may be “fatal” to an employee’s discrimination claims in federal court, absent
20 waiver, estoppel, or equitable tolling. *Lyons v. England*, 307 F.3d 1092, 1105 (9th Cir. 2002);
21 *Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003); *Leorna*, 105 F.3d at 551.

22 Title VII “precludes recovery for discrete acts of discrimination or retaliation that occur
23 outside the statutory time period.” *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105
24 (2002). A plaintiff may not sue for discrete acts of discrimination “such as termination, failure to
25 promote, denial of transfer, or refusal to hire” that occurred outside the limitations period solely
26 because they are related to other discrete acts that occurred inside the limitations period. *Id.* at
27 113-14. “[D]iscrete discriminatory acts are not actionable if time barred, even when they are
28 related to acts alleged in timely filed charges. Because each discrete act starts a new clock for

1 filing charges alleging that act, the charge must be filed within the 180- or 300-day period after
2 the act occurred.” *Id.* at 102.

3 The court previously dismissed Plaintiff’s Title VII discrimination claim based on her
4 November 2023 application for the position of Program Support Assistant for failure to allege
5 administrative exhaustion. *See Barker II*, 2024 WL 2031640, at *4. The SAC does not remedy
6 this fundamental problem. Specifically, it does not allege that Plaintiff timely exhausted her claim
7 of failure to promote in November 2023 by contacting an EEO counselor within 45 days of the
8 discrete event. Plaintiff admits that she did not pursue an administrative remedy with respect to
9 the November 2023 failure to promote, arguing that “[a]fter working for the Agency, for a period
10 of twenty-four years, Plaintiff had no expectation that anything would be gained, changed, or
11 different from past decisions, from Plaintiff filing an additional Charge.” Opp’n 5.

12 Given that Plaintiff will not be able to allege that she timely contacted an EEO counselor
13 regarding the failure to promote, the Title VII claim must be dismissed for failure to exhaust
14 administrative remedies. As Plaintiff has already been given the opportunity to amend the
15 complaint to allege administrative exhaustion as to claims based on the November 2023 failure to
16 promote, the dismissal is with prejudice.¹

17 The ADEA also requires administrative exhaustion. An employee must notify an EEO
18 counselor within 45 days of the alleged discriminatory conduct in order to satisfy the exhaustion
19 requirement. *Whitman v. Mineta*, 541 F.3d 929, 932 (9th Cir. 2008). In the alternative, the
20 individual must give the EEOC notice of the alleged discriminatory act within 180 days and give
21 notice of her intent to sue at least thirty days before commencing suit in a federal court. *Id.* (citing
22 29 U.S.C. §§ 633a(c), (d)). As with the Title VII claim, Plaintiff does not allege that she
23 exhausted her ADEA claim based on the November 2023 failure to promote by either means under

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¹ Plaintiff submitted several documents with her opposition, including documents related to her
26 October 2016 EEO complaint. Opp’n Ex. 1. The court has twice notified Plaintiff that it cannot
27 consider documents attached to an opposition brief or arguments based on such documents. *See*
28 *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (“In determining the
propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff’s
moving papers, such as a memorandum in opposition to a defendant’s motion to dismiss.”). In
any event, the documents submitted with her opposition do not demonstrate that Plaintiff
administratively exhausted claims based the November 2023 failure to promote.

1 the ADEA. Accordingly, the ADEA claim based on the failure to promote is dismissed. The
2 dismissal is with prejudice, as Plaintiff has already been given the opportunity to amend the
3 complaint to allege administrative exhaustion with respect to that claim.²

4 **IV. CONCLUSION**

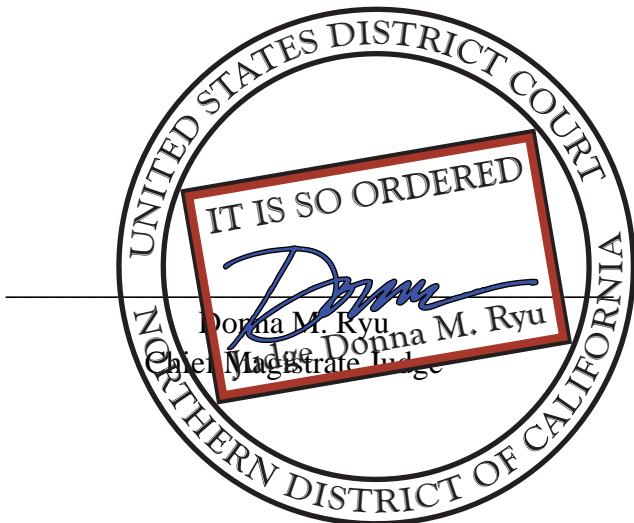
5 For the foregoing reasons, Defendant's motion to dismiss the Title VII and ADEA claims
6 based on the November 2023 failure to promote is granted. Those claims are dismissed with
7 prejudice.

8 The sole remaining claim is Plaintiff's Rehabilitation Act claim for failure to accommodate
9 based on denial of an ergonomic chair. A case management conference is set for October 30,
10 2024 at 1:30 p.m. by Zoom video conference. A joint case management statement is due by
11 October 23, 2024.

12 The court encourages Plaintiff to refer to the section "Representing Yourself" on the
13 Court's website, located at <https://cand.uscourts.gov/pro-se-litigants/>, as well as the Court's Legal
14 Help Centers for unrepresented parties. Parties may schedule an appointment by calling 415-782-
15 8982 or emailing fedpro@sfbar.org.

16 **IT IS SO ORDERED.**

17 Dated: September 19, 2024



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28 ² As the court concludes that the Title VII and ADEA claims are untimely and must be dismissed
on that basis, it does not reach Defendant's arguments that the SAC fails to allege sufficient facts
to state the discrimination claims.